IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 383 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MUSTAQ AHMAD QURESHI - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
MS SADHANA SAGAR appointed by Legal Aid Committee for Appellant
MR RC KODEKAR APP for Respondent – State of Gujarat

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 27/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this appeal under Section 374 of the Code of Criminal Procedure ('the Code' for short) filed from the jail is to the correctness of judgment and order dated 25.2.2000 rendered in Sessions Case No.201 of 1994 by the learned Additional Sessions Judge, Court No.6, City Sessions Court, Ahmedabad. By the impugned judgment and order, the appellant ('the accused' for short) has been convicted for the offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and sentenced to suffer R.I. for ten years and fine of Rs.1 lac and in default of payment of fine, RI for further three months.

2. Background facts, in a nut-shell, are as follows:

2.1. On 21.3.1994, Senghabhai Shivabhai Makwana, Police Inspector of Danilimda Police Station, Ahmedabad, during his duty hours, had proceeded on police patrolling in a Government vehicle with his staff members, i.e., Head Constable Sujaji,

Police Constable Sagarbhai, etc. During police patrolling, at about 6.00 P.M., they came near three road junction of Parixitlalnagar. There, from a secret informant, they received information that one person wearing yellow colour dress was selling pills of narcotic drugs on footpath, opp. Block No.2 of Parixitlalnagar. Therefore, Senghabhai Shivabhai Makwana, Police Inspector immediately made a report to his higher official and made arrangement for two panchas. The panchas were also conveyed the secret information received by him. The accused person was likely to flee if presence of higher official was awaited and, therefore, Senghabhai Shivabhai Makwana, Police Inspector, with his staff members and panchas, proceeded on raid on foot. When they came opp. Block No.2 of Parixitlalnagar, there they found the accused person in yellow dress on foot-path. On seeing the police, the accused started to run away. But he was caught hold of and on his search, 5 plastic pouches were recovered from his right side pocket. On smelling it in presence of panchas, it was felt that the

substance was Charas. The substance recovered from the accused was weighed and it was 2 gram and 800 milligram. A panchnama was prepared in this regard and as the accused was not having any permit or licence to keep such narcotic drugs, he was arrested and the matter was further investigated. After the raid was over, a complaint against the accused in respect of the aforesaid incident was registered at Danilimda Police Station, Ahmedabad for commission of the offence punishable under section 27 of the NDPS Act read with Section 66 (1) (b) of the Bombay Prohibition Act. Thereafter necessary formalities were completed and the muddamal was sent to FSL for chemical analysis and after receipt of the report from the FSL to the effect that the muddamal contraband article was charas, charge-sheet was filed against the accused for commission of offence punishable under Section 27 of the NDPS Act read with Section 66 (1) (b) of the Bombay Prohibition Act in the Court of learned Metropolitan Magistrate, Ahmedabad.

2.2. As the offence under the NDPS Act is exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate, Ahmedabad has committed the case to the City Sessions Court, Ahmedabad.

2.3. The learned Additional Sessions Judge, Court No.6, City Sessions Court, Ahmedabad, to whom the case was made over for trial, framed the charge against the accused for commission of offence under Section 27 of the NDPS Act read with Section 66 (1) (b) of the Bombay Prohibition Act which was read over and explained to the accused. As the accused pleaded not guilty to the charge and claimed to be tried, he was put to trial and tried in Sessions Case No. 201 of 1994.

2.4. To prove the culpability of the accused, the prosecution has relied upon the oral testimony of six prosecution witnesses, the details of which have been given in paragraph 4 of the impugned judgment and order. They are as under:

PW No.	Ex. No.	Pg. No.	Name	Status	Suppor-ted or not suppo-rted	Rema-rks
1	6	33	Mahendrabhai Revabhai Parmar	Panch witnes s	Suppor-ted	Panch wit-ness of search and seiz-ure panch-nama Ex.22, page 179
2	7	41	Sujaji Devaji Thakor	Head Const-able	Suppor-ted	Member of the raid-ing party
3	8	47	Babuji Sukhaji Baranda	ASI Police wit-ness	Suppor-ted	Deposi-ted the Mudda-mal to the FSL

PW No.	Ex. No.	Pg. No.	Name	Status	Suppor-ted or not suppo-rted	Rema-rks
4	11	51	Lalji Khataraji Kotwal	PSO	Suppor-ted	Who regis-tered the off-ence in the stat-ion diary and rece-ived the mudda-mal
5	15	57	Yakubali Babbarali	Head Const-able	Suppor-ted	Custod-ial of the mudda-mal who regis-tered the mudda-mal in the regist-er at page 67 and entry No.59

PW No.	Ex. No.	Pg. No.	Name	Status	Suppor-ted or not suppo-rted	Rema-rks
6	18	59	Sendhabhai Shivabhai Makwana	Compla inant Police Inspec-tor	Suppor-ted	Search the accu-sed person and seized the mudda-mal

2.5.To prove the charge levelled against the accused, the prosecution has also produced following documentary evidence, details of which have been described in paragraph 5 of the impugned judgment and order. They are as under:

Sr. No	Details	Ex.No.
1	Report under Section 157 of the Cr.P.C.	14 & 20
2	Police Complaint	21
3	Panchnama	22
4	Receipt of weight of muddamal seized from accused	23
5	FSL report	9
6	FSL report	24
7	Entry made in station diary regarding receipt of secret information	12
8	Muddamal pavti	13
9	Entry made in Anamati Register	16

Sr. No	Details	Ex.No.
10	Report of higher official	16

2.6. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement he denied the case of the prosecution in toto and claimed that he is totally innocent.

2.7. During the course of submissions made by the learned advocates appearing for the parties, the learned APP pointed out to the trial court that the accused has not taken the defence under Section 27 of the NDPS Act that the small quantity of contraband article seized from his possession was for his personal consumption and, therefore, the charge is required to be altered and amended and the accused is required to be

charged under Section 18 of the NDPS Act instead of section 27 of the NDPS Act and accordingly the trial court has altered and amended the charge and instead of Section 27 of the NDPS Act, Section 18 of the NDPS Act was substituted.

2.8. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the trial court has held that the prosecution has proved its case against the accused beyond reasonable doubt and the contraband article charas weighing 2.800 grams seized from the accused was kept with him for sale and, therefore, he has committed the offence punishable under Section 18 of the NDPS Act and the accused was accordingly convicted for the offence punishable under Section 18 of the NDPS Act and sentenced him to suffer RI for ten years and fine of Rs.1 lakh and in default of payment of fine, RI for further three months, giving rise to this appeal at the instance of the accused from jail.

3. Ms. Sadhna Sagar, learned advocate appointed by the Legal Aid Committee to assist the accused, has contended that during the raid, 5 pouches of charas weighing 2.800 gram, were recovered from the accused which is admittedly a small quantity in terms of Section 27 of the NDPS Act and, therefore, the investigating officer has charged him for the offence punishable under Section 27 of the NDPS Act. However, at the time of arguments, the trial court has wrongly altered and amended the charge and thereby charge for commission of the offence under Section 18 instead of section 27 of the NDPS Act was framed without affording any reasonable opportunity to the accused to defend case, which is not permissible in law. Therefore, according to her, only on this count, the impugned judgment and order deserves to be quashed and set aside by partly allowing the appeal and thereby the accused may be convicted for the offence punishable under Section 27 of the NDPS Act instead of 18 of the NDPS Act.

4. In counter submission, Mr. RC Kodekar, learned APP, has fairly submitted that it is true that the charge-sheet was filed for the offence punishable under Section 27 of the NDPS Act and during the course of hearing, the trial court has altered and amended the charge without affording opportunity to the accused to defend his case and, therefore, appropriate order may be passed quashing and setting aside the impugned judgment and order convicting the accused for the offence punishable under Section 18 of the NDPS Act and instead of that he may be convicted and sentenced for the offence punishable under Section 27 of the NSPS Act, as originally charged.

5. This court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad

and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS Cases, this Court has examined the entire evidence on record for itself independently of the learned trial Judge and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial court has rightly recorded the order of conviction and sentence.

6. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

> “The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This

Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith".

7. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Police Inspector during the course of search of the accused and seizure of the muddamal, contraband article, charas.

8. A perusal of the entire testimonial collections in the form of oral as well as documentary evidence, there is no manner of doubt that the on 21.3.1994, PW 6, Sendhabhai Shivabhai Makwana, Ex.18, on the basis of the

secret information received by him, apprehended the accused and after following necessary formalities, recovered from him 5 pouches of charas weighing 2.800 grams and thereafter the investigation was carried out and he was charge-sheeted for commission of the offence punishable under Section 27 of the NDPS Act. The trial court had framed charge under Section 27 of the NDPS Act read with section 66 (1) (b) of the Bombay Prohibition Act and started the trial. During the trial, therefore, obviously the accused defended his case on the basis of the said charge. However, during the course of hearing of the learned advocates for the parties, on the basis of the oral request made by the learned APP, the trial Court has altered and amended the charge by substituting Section 18 of the NDPS Act in place of Section 27 of NDPS Act and, therefore, obviously the accused had no opportunity to defend his case that the contraband article charas was for his personal consumption as he was under the impression that the prosecution has accepted that the contraband article charas was

for his personal consumption since the charge sheet was filed for the offence punishable under Section 27 of the NDPS Act.

9. In view of the aforesaid state of affairs, we are of the considered opinion that the accused was not given opportunity to defend his case by advancing his plea that the contraband article charas recovered from him was for his personal consumption.

10. In this connection, it would be necessary to refer to Section 27 of the NDPS Act, which reads as under:

> **"27. Punishment for illegal possession in small quantity for personal consumption of any narcotic drug or psychotropic substance or consumption of such drug or substance.**-- Whoever, in contravention of any provision of this Act, or any rule or order made or permit issued thereunder, possesses in a small quantity, any narcotic drug or psychotropic

substance, which is proved to have been intended for his personal consumption and not for sale, or distribution, or consumes any narcotic drug or psychotropic substance, shall, notwithstanding anything contained in this Chapter, be punishable,--

(a) where the narcotic drug or psychotropic substance possessed or consumed is cocaine, morphine, diacetyl-morphine or any other narcotic drug or any psychotropic substance as may be specified in this behalf by the Central Government, by notification in the Official Gazette, with imprisonment for a term which may extend to one year or with fine or with both, and

(b) where the narcotic drug or psychotropic substance possessed or consumed is other than those specified in or under Cl. (a), with imprisonment for a term which may extend to six months or with fine or with both.

Explanation.-- (1) For the purposes of this section “small quantity” means such quantity

as may be specified by the Central Government by notification in the Official Gazette.

(2) Where a person is shown to have been in possession of a small quantity of a narcotic drug or psychotropic substance, the burden of proving that it was intended for the personal consumption of such person and not for sale or distribution, shall lie on such person."

A fair look of sub-clause (2) of Explanation appended to Section 27 of th NDPS Act, in terms, stipulates that the burden of proving that it was intended for the personal consumption of such person and not for sale or distribution shall lie on such person. In instant case the charge was framed under the offence punishable under Section 27 of the NDPS Act. Therefore, obviously it is not necessary for the accused to lead evidence in this regard. At the fag end of the trial, i.e., after recording of his further statement under Section 313 of the Code, when the charge is altered and amended he could not have

defended his case to show that the contraband article charas was for his personal consumption.

11. So far as the quantity of charas recovered from the accused was concerned, it was in five pouches, weighing 2.800 grams. Admittedly, within the meaning of the explanation appended to Section 27 of the NDPS Act, it is a small quantity.

12. At this stage, it would be appropriate to refer to the notification No.S.O. 527 (E) dated 16th July 1996. By virtue of the said notification, in exercise of the powers conferred by Explanation (1) to Section 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of the notifications of the Government of India, in the Ministry of Finance, Department of Revenue, Numbers S.O. 825 (E), dated 14th November, 1985 and S.O. 827 (E), dated the 14th November, 1985 except as respects things done or omitted to be done before such

supersession, the Central Government hereby specifies the quantity mentioned in Column (3) of the Table below, in relation to the narcotic drugs and psychotropic substances mentioned in the corresponding entry in Column (2) of the said table, as “small quantity” for the purpose of Cl. (b) of that section.

T A B L E

Sl.No	Name of the narcotic drugs and psychotropic substance	Quantity (in grams)
(1)	(2)	(3)
1	Opium and any preparations containing opium	25
2	Opium derivative (other than di-acetyl) morphine heroin, morphine and those listed below) their salts and preparations containing such opium derivatives or their salts	5
3	Poppy straw	100
4	charas (Cannabis resin)	25
5	xxxxxxxxxx	xxx
6	xxxxxxxxxx	xxx

Admittedly, in instant case, the charas recovered from the accused was weighing only 2.800 grams. Therefore, it is a very small quantity for which the punishment prescribed is imprisonment for a term which may extend to six months or with fine or with both.

13. In this connection, it would be appropriate to refer to the judgment of the Supreme Court in the case of Gaunter Edwin Kircher v. State of Goa, (1993) 3 SCC 145, wherein the Supreme court has observed that:

> "Though the menace of trafficking in narcotic drugs and psychotropic substances has to be dealt with severely but in view of section 27, the small quantity found with the appellant can be held to be meant for his personal consumption and not for sale or distribution, therefore, the appellant is liable to be punished as provided under Section 27 of the Act and not under Section 20 (b)(ii) of the NDPS Act.

Applying the principle laid down by the Supreme Court in the above referred case to the facts of the present case, according to us, it is not necessary for the accused to discharge the burden in terms of sub-section (2) of Explanation

appended to Section 27 of the NDPS Act. The charge framed against the accused was for commission of offence punishable under Section 27 of the NDPS Act and it is not open for the trial Court to alter or amend the charge during the course of hearing the arguments of the learned advocates of the parties without affording opportunity to the accused to plead his defence of personal consumption. If the charge framed against him at the initial stage was for commission of the offence punishable under section 18 of the NDPS Act, he would have defended his case accordingly.

14. In view of the aforesaid discussion, according to this court, the accused has committed offence punishable under section 27 (b) of the NDPS Act which is punishable with imprisonment for a term which may extend to six months or with fine or with both. Therefore, it will be appropriate to convict the accused for commission of the offence punishable under

Section 27 (b) of the NDPS Act and not under Section 18 of the NDPS Act.

15. Seen in the above context, the impugned judgment and order convicting the accused under Section 18 of the NDPS Act and sentencing him to suffer R.I. for ten years and fine of Rs.1 lac and in default of payment of fine, RI for further three years, deserves to be quashed and set aside and the accused is required to be convicted for the offence punishable under Section 27 (b) of the NDPS Act.

16. So far as the sentence is concerned, for commission of offence punishable under Section 27 (b) of the NDPS Act, the accused can be convicted for a term of six months or with fine or with both. From the date of pronouncement of the judgment and order of conviction and sentence passed by the trial court, as stated by Mr. Kodekar, learned APP, the accused is in jail. Therefore, the accused has undergone sentence of

more than six years and, therefore, he deserves to be set at liberty forthwith.

17. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed. The impugned judgment and order dated 25.2.2000 passed by the learned Additional Sessions Judge, Court No.6, City Sessions Court, Ahmedabad, in Sessions Case No.201 of 1994 convicting the accused for commission of the offence punishable under Section 18 of the NDPS Act and sentencing him to suffer RI for ten years and fine of Rs. 1 lac and in default of payment of fine, RI for further three months, is quashed and set aside and instead of that the accused is convicted for the offence publishable under Section 27 of the NDPS Act and sentenced him to suffer RI for six months and to pay fine of Rs.25,000/- and in default of payment of fine, he shall undergo RI for further three months.

As per the record produced by Mr. Kodekar,

learned APP, the accused is in jail since the date of judgment i.e., 25.2.2000. Therefore, he has already undergone imprisonment for more than six years. Therefore, jail authorities are directed to set him at liberty forthwith if he is not required in connection with any other case.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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